

DOL Issues Mandatory Poster and FAQ's Addressing the New Paid Federal Leaves

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Today, the Department of Labor rolled out the [mandatory poster](#) outlining employee rights to the new [Emergency Paid Sick Leave](#) (E-PSL) and [Emergency Family and Medical Leave Act](#) (E-FMLA) mandated by the new Families First Coronavirus Response Act (FFCRA). Based on this and other guidance from the DOL, it is indicating that these leaves will become effective ***April 1, 2020***, a day earlier than many had expected.

The poster needs to be posted on or before that new effective date, in a “conspicuous place” on all covered employers premises. While that should include your standard workplace posting locations (breakrooms, by timecard stations at jobsites, etc.), in accompanying resource materials DOL has suggested that: [An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website](#). Employers would therefore be wise to consider providing individual copies by email and/or mail for any current employees who are working remotely or potentially already on furlough and not reporting to work.

Additional rulemaking is underway and expected in the coming days, but in the meantime there are additional FAQ's and general guidance posted on the Department of Labor's [“COVID-19 and the American Workplace”](#) resource page. So far these initial compliance resources have clarified a few specifics such as:

- **How the total employee count, for purposes of determining applicability of these new leave mandates are to be determined.** Again, the FFCRA applies to only those employers with less than 500 employees. Based upon the additional guidance documents published this week, we understand that it is based upon the total as of the day [any applicable leave is to commence](#). For example, if an employee requests leave on April 5, 2020, then the employer would determine its size as of that day, by total headcount not FTE basis. If that number is 499 or less, then the leave entitlement and corresponding tax credits would apply. If it is more, then it would not.

In addition, the [DOL's FFCRA Questions and Answers](#) has stated for now that headcount totals for purpose of FFCRA leaves should also include:

- » *employees on leave;*
- » *temporary employees who “are jointly employed by you and another employer (regardless of whether the [jointly-employed employees](#) are maintained on only your or another employer’s payroll); and*
- » *day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship).*

See Question 2 on the DOL's FFCRA Q&A.

For E-FMLA purposes only, the DOL's Q&A guidance suggests that conversely all entities/operations with “integrated operations” (as those terms are defined under existing FMLA authority) should be counted for determining E-FMLA benefits entitlements.

- **How rate of pay is expected to be determined.** Recall that the benefits amounts are based upon the employee's "regular rate of pay," either in whole or at a 2/3rds rate depending on the leave type, subject to a cap. This DOL's guidance materials indicate the "regular rate of pay" will be determined based upon the average over the prior 6 month period, or if the employee was not employed for a full 6 months, then over the relevant period of employment. A note of caution that "regular rate" will also be defined consistent with existing FLSA guidance, so may not be limited to just the employee's regular hourly rate.
- **Pre-Enactment Provided Leave.** Some employers have been wondering if they provided leave at the outset of significant social distancing, public health directives, and other government orders, if they can utilize the federal tax benefits and consider the previously provided leave as satisfying E-PSL requirements. The DOL answered that question in [their Q&A](#) numbers 11 and 13 with a resounding no, indicating, consistent with statutory language, that E-PSL is in addition to other leaves provided by the employer and a new separate requirement.

For further information about ongoing developments related to COVID-19, visit [Miller Nash Graham & Dunn's resource library](#).

Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps business must take under applicable laws.



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